Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1996

ANTHONY J. POCCHIA,

Petitioner,

v.

NYNEX CORPORATION and NYNEX SERVICE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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39 pp

QUESTIONS PRESENTED

I. Where Employee Retirement Income Security Act ("ERISA") covered pension plan fiduciaries are in the process of changing and/or amending their plans, does ERISA require plan beneficiaries be notified of when the changes are being seriously considered or can plan fiduciaries wait until formal approval of the changes before they have a duty to inform plan beneficiaries?

II. If plan administrators are required to inform plan beneficiaries prior to the formal adoption of plan changes, are they required to inform even those beneficiaries who do not specifically ask if changes are planned or being seriously considered?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

ANTHONY J. POCCHIA,
Petitioner,

vs.

NYNEX CORPORATION and NYNEX SERVICE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

Anthony J. Pocchia ("Pocchia") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on April 9, 1996 and upon which a Petition for Rehearing with a suggestion of en banc was denied by an order entered on May 29, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 81 F.3d 275 and is reproduced in the Appendix filed herewith ("App.") at 2a along with the denial of the petition for rehearing with a suggestion of en banc at 1a. The unreported opinion of the District Court in this case is reproduced at 13a.

STATEMENT OF JURISDICTION

The United States Court of Appeals entered its judgment on April 9, 1996, and denied a petition for rehearing with a suggestion of en banc on May 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

The pertinent provision of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001, et seq. ("ERISA") is set forth below:

> Section 1104 (a). Prudent man standard of care:
>
> (1)...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and...
>
> Section 1104 (b)...with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

STATEMENT OF THE CASE

Anthony J. Pocchia, a career employee of NYNEX Corporation and its wholly owned subsidiary, NYNEX Service Company, negotiated a voluntary resignation in exchange for a monetary settlement. At the time of his resignation Pocchia had spent his entire working life as an employee of NYNEX Corporation, it's subsidiaries or predecessor entities. The only absence Pocchia had was for a four (4) year military leave during the Vietnam War Era for which he received company time credit. A Release was executed and effective on May 15, 1989. Pocchia at the time was a plan beneficiary of the NYNEX Management Employee Retirement Plan and was entitled to a deferred vested pension in a plan covered by the Employee Retirement Income Security Act of 1974.

On December 21, 1989, NYNEX Corporation publicly announced that their Board of Directors had formally approved an early retirement incentive program on December 20, 1989. Mr. Pocchia, had he remained an employee until the announcement, would have been qualified for the retirement incentive and a greatly enhanced, immediately payable pension.

Mr. Pocchia, by letter dated January 22, 1990, contacted NYNEX Corporation seeking inclusion in the announced retirement incentive. His request was rejected and an action was commenced in the New York State Supreme Court, Richmond County.

NYNEX Corporation successfully sought removal to the United States District Court for the Eastern District of New York under federal question jurisdiction.

Pocchia claimed that NYNEX Corporation knew of the pending plan change when high level corporate officers, including the Vice President and General Counsel, were negotiating his resignation and failed to inform him of the planned pension change.

John C. Stetson, Esq., a senior attorney and Assistant Corporate Secretary filed an affidavit stating that he personally knew of the early retirement incentive plan in late 1988 or early 1989 before Pocchia resigned. Stetson also claimed the Vice President and General Counsel, with whom Pocchia negotiated, and others knew of the plan at the same time. Stetson stated it was general knowledge at corporate headquarters and offered to name "hundreds" of people who he believed knew of the plan. Stetson, who was having his own problems with NYNEX Corporation, took advantage of the early retirement plan and retired under the enhanced retirement incentive. He later filed a Age Discrimination suit against NYNEX under the Age Discrimination Act. Stetson's litigation resulted in summary judgment for NYNEX which was affirmed on appeal to the United States Court of Appeals for the Second Circuit.

The District Court ordered Stetson submit to a disposition where the court determined that during the deposition he recanted his affidavit regarding the Vice President and General Counsel's knowledge of the plan. Pocchia maintained that, at a minimum, a question of fact remained to be decided by the trier of fact, and that Stetson clearly never recanted his personal knowledge of the plan.

The District Court granted NYNEX Corporation summary judgment stating no material issue of fact remained to be decided. The United States Court of Appeals for the Second Circuit affirmed and denied a petition for rehearing with a suggestion of en banc, holding it did not matter if and when

Stetson or others knew since there was no plan until it was formally adopted by the Board of Directors on December 20, 1989 and no duty to disclose arose until formal adoption. The District Court also held that Pocchia failed to established that an action, based upon equity, exists under ERISA.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeals on two important issues concerning the relationship imposed upon plan administrators regarding changes and/or amendments to ERISA covered pension plans. In *Varity Corp. v. Charles Howe*, ___ U.S.___; 116 S.Ct. 1065 (1996), this Court[1] began analysis, although stopping short of the relief herein requested, that should lead to the conclusion sought in this case. This Court wrote "conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power "appropriate" to carrying out an important plan purpose. After all, ERISA itself specifically requires administrators to give beneficiaries certain information about the plan. See, e.g. ERISA sections 102, 104(b)(1), 105(a)."

The decision by the United States Court of Appeals for the Second Circuit in this case expands its decision in *Mullins v. Pfizer*, 93 F.3d 662 (2nd Cir. 1994), which held that ERISA fiduciaries did not have to be "perfectly prescient as to all future

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1. The United States District Court for the Eastern District in granting summary judgment to NYNEX held that ERISA does not contain provision for equitable relief. The United States Supreme Court in *Varity, id.*, found equitable relief possible under ERISA.

changes[2]" and as long as when the administrator spoke, he spoke "truthfully", and joins the United States Court of Appeals for the Fourth Circuit which held that "(i)t is not a violation of ERISA to fail to furnish information regarding amendments before these amendments are put into effect." *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir, 1986). Unfortunately, *Stanton, id.*, was decided ten (10) years ago in an area of the law that has greatly evolved and whose main issue has become critical in the present environment of corporate downsizing and cutbacks. In essence these decisions conclude with a "bright line" test stating that until formal approval by the requisite corporate body, there is no plan.

However, the Second Circuit's holding in this case is contrary to the reasoning in *Berlin v. Michigan Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988), where the United States Court of Appeals for the Sixth Circuit created the "serious consideration doctrine" as time when a plan fiduciary is duty bound to inform plan beneficiaries of proposed changes to ERISA covered pension plans. The Sixth Circuit concluded that it would only find liability if material misrepresentations were made in relations to the plan administrator's duty to disclose.

More on point, the Second Circuit's decision is in direct opposition to the United States Court of Appeals for the Third Circuit which held that "the date of serious consideration triggers not only the date to inform those who ask, but also to inform those who do not ask but to whom a fiduciary duty and need to know exists. *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3rd Cir. 1993). See

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2. There is evidence in this case that official NYNEX corporate policy was that no retirement incentive would be offered. In fact, a 1988 pension plan change has been described as an early retirement "dis-incentive" by increasing the pension eligible retirement age.

also, *Kurz v. Philadelphia Electric Co.*, 994 F.2d 136 (3rd Cir. 1993); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130 (3rd Cir. 1993).

I.

WHERE ERISA COVERED PLAN ADMINISTRATORS ARE IN PROCESS OF CHANGING OR AMENDING THEIR PLANS, ERISA MUST REQUIRE NOTICE TO PLAN BENEFICIARIES AT THE COMMENCEMENT OF SERIOUS CONSIDERATION TO AVOID PLAN BENEFICIARIES FROM LOSING BENEFITS THAT THEY HAD PREVIOUSLY EARNED AND TO WHICH THEY ARE ENTITLED.

In 1974, Congress enacted the Employee Retirement Income Security Act, a comprehensive federal statue, to regulate privately established employee benefit plans. Congress designed ERISA to protect plan participants and beneficiaries from such unfair practices by employers as unconscionable forfeiture provisions and the misuse of plan assets. To this end, ERISA provides, among other protection, broad coverage requirements, minimum vesting standards and fiduciary responsibilities for those persons who deal with the plan or plan assets on any discretionary basis.

The Second Circuit's opinion in this case deals a serious blow to the clear intent of Congress, unduly and unfairly burdens plan beneficiaries, and removes a fundamental fiduciary duty from plan administrators. It requires a level of sophistication beyond the scope of most plan beneficiaries and opens the door for abuse by unscrupulous plan administrators. It also ignores the practical process of retirement in most, if not all, corporations covered by ERISA plans. That is, potential

retirees must announce their plan to retire[3] and file the necessary forms. It is at this point that the notice requirement could be required without any undue burden on the corporate managers - plan administrators.

The importance of this issue can not be over stated. A recent public service announcement on WOR radio, a New York City based station with a national feed, discussed recent court decisions regarding pension changes and urged listeners who were contemplating retirement to send United States Post Office certified letters, return receipt requested, to the highest management levels of their corporate employers asking if any pension changes were being considered or planned. The announcement went further and advised that anyone contemplating retirement immediately contact a lawyer to protect their rights.

Surely, Congress in crafting ERISA never envisioned the need for this when creating a fiduciary relationship between plan administrators and plan beneficiaries. Certainly the common law of trust, upon which all Circuits agree ERISA is, in part, predicated, does not contain such a burden on beneficiaries.

Further, the obvious potential for the manipulation of pension plan changes under a bright line test emasculates any real protection of plan beneficiaries by unscrupulous plan administrators. Finally, the level of sophistication imposed by a bright line test applied to lower level employees is patently ludicrous.

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3. In this instant case, it would have been at the time the negotiations for voluntary resignation were being conducted that would have triggered the notice requirement.

II.

ERISA COVERED PLAN BENEFICIARIES MUST BE NOTIFIED UPON SERIOUS CONSIDERATION, WHETHER OR NOT THEY ASK OR AN UNFAIR BURDEN WOULD BE PLACED UPON BENEFICIARIES AND THE BASIC TENANTS OF THE FIDUCIARY RELATIONSHIP BETWEEN PLAN ADMINISTRATORS AND PLAN BENEFICIARIES WOULD BE DESTROYED.

The Second Circuit found that disclosure prior to formal adoption would "unduly burden management" and "increase the likelihood of confusion on the part of beneficiaries." It is difficult, given the practical processes of retirement, to envision either actually happening.

First, even if there was any burden placed on management, it is part of the fiduciary duty imposed by ERISA and the common law of trusts. The burden, if any, arises because management chooses to be both management and plan administrators, not because of any actions on the part of plan beneficiaries.

Second, the Second Circuit places an undue and, in most cases, an impossible burden on less sophisticated plan beneficiaries to "know the right questions to ask." The reason ERISA imposes a fiduciary burden on plan administrators, who are also usually the corporate managers, is in recognition of the difference in knowledge and sophistication between the two.

The only confusion that is likely to be caused to plan beneficiaries is to alert them that they need more information before they make a final choice and lose significant benefits. It must remembered that these employees have given notice to

their managers of the intention to retire. The fact that these corporate managers choose to wear two hats and also be plan administrators intensifies their fiduciary duty, it does not relieve them of it.

In addition, if plan administrators are only required to truthfully answer those who ask, as the Second Circuit would require, we punish those most in need of the fiduciary relationship Congress created under ERISA. Clearly, the high level corporate managers will know, even before serious consideration. By virtue of their positions, they will know the first time the idea is raised. It is the other employees who need the protection. The Second and Fourth Circuits, by their holdings, create two classes of employees; high level managers who least need the protection of the fiduciary duty imposed by ERISA, and the secretaries and janitors who must fend for themselves without a duty requiring they be given the information they need at earliest possible time when they are about to make their critical decision regarding retirement.

Finally, the Second Circuit is clearly in opposition to the holding of the United States Supreme Court in *Varity, id.*, which held that "ERISA requires a fiduciary to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries"; it is only a misreading of ERISA, by the Second Circuit, that could find any balancing of the burdens between plan administrators, (who double as corporate managers) and plan beneficiaries. Certainly, the common law of Trust which also holds the that the sole duty owed by trustees is to beneficiaries.[4] And to find a likelihood of confusion arises because critical information is given to plan beneficiaries at the earliest possible time is nonsense. Knowledge to make an

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4. See Bogert & Bogert, Law of Trusts and Trustees, Section 551 at 41.

informed decision is always proper, just and is what Congress intended by passage of ERISA.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING WITH A SUGGESTION OF EN BANC.

Decided May 29, 1996

At a stated term of the United States court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29 day of May one thousand nine hundred and ninety-six.

----------x

ANTHONY J. POCCHIA,
Plaintiff-Appellant

-against-

NYNEX CORPORATION and NYNEX SERVICE COMPANY
Defendants-Apellees

----------x

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Anthony J. Pocchia.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is *DENIED*.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III,
Clerk

By: S/
Beth J. Meador,
Administrative Attorney

United States Court of Appeals
Filed: May 29, 1996
George Lange III, Clerk
Second Circuit

APPENDIX B
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 9, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Argued December 12, 1995 Decided April 9, 1996

No. 95 - 7598

----------x

ANTHONY J. POCCHIA,
Plaintiff-Appellant

-against-

NYNEX CORPORATION and NYNEX SERVICE COMPANY,
Defendants-Appellees

----------x

Appeal from the United States District Court
for the Eastern District of New York

Anthony J. Pocchia argued the cause and filed the briefs for appellant.

Lon S. Bannett argued the cause and filed the brief for the Appellees.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 674 -- August Term 1995

Argued December 12, 1995 Decided April 9, 1996

----------x

ANTHONY J. POCCHIA,

Plaintiff-Appellant

-against-

NYNEX CORPORATION and NYNEX SERVICE COMPANY,

Defendants-Appellees

----------x

B e f o r e : OAKES, WINTER, and WALKER, *Circuit Judges.*

Appeal by Plaintiff from an order granting summary judgment in favor of Defendants before the United States District Court for the Eastern District of New York (Trager, J.), on the ground that the district court erred in finding that Plaintiff had not raised a material issue of fact with respect to his claim that Defendants breached a fiduciary duty owed to him under the Employee Retirement Income Security Act by not informing him at the time he retired that they had decided to implement or, alternatively, were considering implementing, an early retirement plan.

Affirmed.

ANTHONY J. POCCHIA, ESQ.
Staten Island, NY, *Pro se*
Plaintiff-Appellant.

LON S. BANNETT, ESQ.,
New York, New York
for Defendants-Appellees.

WALKER, *Circuit Judge:*

Several months after Plaintiff-Appellant Anthony J. Pocchia retired from a career with the NYNEX Corporation, the company announced changes in its retirement plan that would have benefitted Pocchia. Pocchia sued the company claiming that it breached a fiduciary duty owed to him under the Employee Retirement Income Security Act ("ERISA") by not informing him, at the time he was negotiating the terms of his resignation, that it had already decided to implement an early retirement plan. He also argued that even if the company was only considering a new plan when he retired, he should have been informed of that fact before he left the company.

The United States District Court for the Eastern District of New York (David G. Trager, *District Judge*) granted summary judgment in favor of Defendants-Appellee NYNEX Corporation and its subsidiary, NYNEX Services Company (together "NYNEX"). On appeal, Pocchia contends that the district court erred in finding no material issue of fact as to whether NYNEX made its decision to implement an early retirement plan before he left the company and he makes the same legal arguments as he did in the district court.

The judgment of the district court is affirmed.

BACKGROUND

On May 15, 1989, Pocchia voluntarily resigned from his position at NYNEX Service Company. Pocchia had worked for NYNEX Corporation or one of its subsidiary or predecessor corporations since May 1965. When he resigned, he signed an agreement, the terms of which entitle him to a lump sum payment of $28,500 and prevented him from raising certain claims against his former employer. More that seven months later, on December 21, 1989, NYNEX announced its new early retirement incentive plan. If Pocchia had retired under this new plan, he would have been entitled to enhanced benefits. By letter dated January 22, 1990, Pocchia requested that he be reinstated and/or included in the new plan. NYNEX denied this request. On April 20, 1990, Pocchia filed this suit against NYNEX. On May 30, 1995, the district court granted summary judgment in favor of NYNEX. Pocchia's appeal to this court followed.

DISCUSSION

It is well-settled that in ruling on a motion for summary judgment, a

> judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-movant] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Furthermore, a district judge must view the evidence in the light

most favorable to the non-moving party and must draw all inferences in favor of the party. *See Hanson v. McCaw Cellular Communications, Inc.*, 1996 WL 87468, *3 (2d Cir. 1996). When reviewing the grant of a summary judgment motion, we must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

I. NYNEX's Fiduciary Duties

The parties are in agreement that the NYNEX pension plan is covered under ERISA, that NYNEX is a plan fiduciary, and that Pocchia is a plan beneficiary. Pocchia claims that NYNEX breached its fiduciary duty owed to him under ERISA by not informing him at the time he retired that it had decided to implementing, an early retirement plan. Pocchia claims that the district court misapplied the law to the facts in finding that such a duty did not exist.

The duties owed by a fiduciary under ERISA are codified at 29 U.S.C. § 1104 which, in relevant part, provides:

> (A) Prudent man standard of care [:] (10 .... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Because the statute does not enumerate or elaborate in any detail on the duties owed by a fiduciary t o a plan beneficiary,

the courts have been upon to define the scope of a fiduciary's responsibilities. *See, Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F. 3d 1292, 1299 (3d Cir. 1993) ("Although the [ERISA] statute articulates a number of fiduciary duties, it is not exhaustive."); *see Central States, Southeast & Southwest Areas Pension Fund v. Central Trans., Inc.*, 472 U.S. 559, 570 (1985) ("[R]ather that explicitly enumerating all of the powers and duties of trustees and other fiduciaries [ERISA], Congress invoked the common law of trusts to define the general scope of their authority and responsibility.").

It is well-settled that plan fiduciaries may not affirmatively mislead plan participants about changes, effective or under consideration, to employee pension benefit plans. See *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *Fisher v. Philadelphia Elec. Co.*, 994 F.2d 130,125 (3d Cir. 1993), *vacated in part on other grounds*, Nos. Civ. A. 90-8020, Civ. A. 91-2771, 1995 WL 510300 (E.D. Pa. Aug. 22, 1995); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. Denied,* 113 S. Ct. 2416 (1993); *Barnes v. Lacy*, 927 F. 2d 539 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991); *Berlin v. Michigan Bell Tel. Co.*, 858 F. 2d 1154, 1163 (6th Cir. 1988). The law is not well-developed, however, with respect to whether fiduciaries must disclose plan changes that have been proposed and/or considered but not yet adopted in the absence of a request for such information by a plan beneficiary. Courts that have held that fiduciaries must disclose proposed changes absent a request have done so in the limited context of cases where confusion had been created on the part of the beneficiary by prior actions of the fiduciary. *See e.g., Fischer v. Philadelphia Elec. Co.*, Nos. Civ. A. 9-8020, Civ. A. 91-2771, 1995 WL 510300, *2 (E.D. Pa. 1995) *Bixler*, 12 F.2d at 1200. Such cases provide limited guidance for dealing with

the more frequent situation in which no such confusion was created by the fiduciary but where the beneficiary simply believes that he should have been provided with more information to enable him to make a more informed decision with respect to the financial consequences of his retirement.

Although the circumstances present in the *Mullins* case did not require us to decide whether a fiduciary must volunteer proposed plan changes, we stated in dicta that "we do not require an ERISA fiduciary to be perfectly prescient as to all future changes in employee benefits. Nor do we require a fiduciary to disclose its internal deliberations." *Mullins*, 23 F. 3d at 669 (internal quotations and citations omitted). The question regarding proposed plan changes that have not been adopted is now squarely before us. We answer the question in the negative and changes in a benefit plan before they are adopted. In so doing, we join the Fourth Circuit which has held that "[i]t is not a violation of ERISA to fail to furnish information regarding amendments before these amendments are put into effect." *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986). We recognize that a plan may be formally adopted by a fiduciary prior to the time that it becomes effective and believe that when this occurs, it is the adoption date, rather than the effective date, that gives rise to a duty to disclose.

Until a plan is adopted, there is no plan, simply the possibility of one. Insisting on voluntary disclosure during the formulation of a plan and prior to its adoption would, we think, increase the likelihood of confusion on the part of beneficiaries faced with continuing uncertainty as to what to disclose and when disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals. One commentator has posited the situation where a business seeking to reduce its workforce contemplates a future necessary reductions do not occur through retirements or resignations. If fiduciaries were required to disclose such a

business strategy, it would necessarily fail. Employees simply planned if workforce reductions were insufficient. See, Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty to Disclose?*, 54 U. Pitt. L. Rev. 979, 997 (1993). On ERISA fiduciaries was to ensure that "employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended." H.R. Rep. No. 533, 93d Cong., 2d Sess. VI (1974), reprinted in 1974 U.S.C.C.A.N. 4639. *See also Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) ("The fiduciary duty imposed by ERISA is generally applied to the management of plan assets. Common law trust principles provide the foundation for the statutory standard, which prohibits the use of plan assets fort the primary benefit of a party other than the plan itself."), *cert. denied*, 485 &.S. 937 (1988); *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984) ("Congress in its findings and declaration of policy sought to assure the equitable character and financial soundness of trustee benefit plans."); *Fine v. Semet,* 699 F.2d 1091, 1094 (11th Cir. 1983) (proper financial management o plans was Congress's goal in holding ERISA fiduciaries to the "prudent man" standard). Permitting plan fiduciaries to keep secret their pre-adoption deliberations and discussions n no way frustrates this purpose. Rather, such a bright-line rule protects the interests of beneficiaries, who will receive information at the earliest point at which their rights can possibly be affected, as well as the interests of beneficiaries, who will receive information at the earliest point at which their rights can possibly be affected, as well as the interests of fiduciaries, who will be required to provide information only at the point at which it becomes complete and accurate.

II. The Date of the Benefit Change

Pocchia concedes that at the time he was negotiating his retirement, he never inquired into the possibility that NYNEX would be implementing any new benefits programs. He claims that, failing to so inquire, he "was operating under the belief,

often discussed in the company by employees not privy to high level information or whose work location was corporate headquarters, that no early retirement incentive would be offered by NYNEX." Pocchia's reasons for failing to inquire, however, are legally insignificant and do not give rise to any material issues of fact which would require examination by a trier of fact. While NYNEX had a fiduciary duty not to make affirmative disclose proposed changes in the absence of inquiry by Pocchia. NYNEX only came under a duty to voluntarily disclose once it adopted the plan changes.

NYNEX presented evidence -- principally an affidavit submitted by Robert F. Leonard, Directory of Benefits Planning for NYNEX, and interrogatory answers provided by William Ferguson, Chief Executive Office and Chairman of the Board of Directors of NYNEX -- that suggest that NYNEX did not decide to adopt the new pension plan until November or December 1989. Pocchia argues that the evidence he presented to the district court was sufficient to raise a material issue of fact as to when NYNEX decided to adopt the new incentive program. He claims that at the time was considering retirement, NYNEX had already approved the early retirement plan and that all that was needed to implement the plan was the "rubber stamp" of NYNEX's Board of Directors.

Pocchia claims that the affidavits of John C. Stetson and Patrick Lee, two NYNEX Service Company("NSC") attorneys, support Pocchia's contention that NYNEX knew about the new plan prior to U.S. 932 (1987); *Charles v. General Motors Corp.,* 758 F.2d 839, 840 (2d Cir. 1985) (per curiam) ("[M]ere conjecture or speculation by the party resisting summary judgment does not provide a basis upon which to deny the motion.").

Thus, viewing the evidence in the light most favorable to Pocchia, which we must, *Adickes v. S.H.Kress & Co.,* 398 U.S. 144, 157 (1970) we cannot conclude that Judge Trager

erred in finding that Pocchia failed to sustain his burden of presenting evidence from which a jury could reasonably find that NYNEX that adopted an early retirement program by the time Pocchia resigned.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

APPENDIX C
MEMORANDUM OPINION AND ORDER OF THE UNITED SATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FILED MAY 30, 1995

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 90-1758

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ANTHONY J. POCCHIA,

Plaintiff,

-against-

NYNEX CORPORATION and
NYNEX SERVICE COMPANY,

Defendants

----------x

MEMORANDUM OPINION AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ANTHONY J. POCCHIA,
Plaintiff,

MEMORANDOM
and
ORDER

-against-

Civil Action
No. CV-90-1758

NYNEX CORPORATION and NYNEX SERVICE COMPANY,
Defendants.

----------x

TRAGER, District Judge:

The defendants have moved for summary judgment, and plaintiff has cross-moved for partial summary judgment. For the reasons set forth below, the court grants the defendants' motion, and denies plaintiff's motion.

I. *Background*

The plaintiff, Anthony Pocchia, is a lawyer and represents himself in this suit. He worked in a non-legal capacity for defendant NYNEX Corporation ("NYNEX") or one of its subsidiaries or predecessor corporations from May 1965 until he resigned on May 15, 1989. In particular, Pocchia was employed at the Defendant NYNEX Service Company ("NSC"), a subsidiary of NYNEX, from October 1983 until he resigned. On December 21, 1989, a little over six months after Pocchia resigned, NYNEX announced a new early retirement plan which provided enhanced benefits for managers on the payroll on January 1, 1990 who retired before June 1, 1990. Pocchia quickly learned of the plan after it was announced, as

on January 22, 1990, he wrote a letter to Saul Fisher, Esq., vice-president and general counsel of NSC, in which he claimed that "[i]f I had been made aware that there was even the remotest possibility that NYNEX was contemplating such a policy reversal and a early retirement incentive program during our negotiations, I would not have resigned." Pocchia requested that his case be reviewed: "My separation from NYNEX, although difficult and painful, was amicable. I would prefer to resolve this situation in a similar manner." Pocchia, however, was not offered any additional benefits.

Approximately three months later, in April 1990, Pocchia commenced this action in New York State Supreme Court based on NSC's denial of his request that he be deemed a beneficiary of the early retirement incentive plan announced in December 1989. In his complaint, Pocchia alleged a series of events which he claimed precipitated his departure from NSC. He claimed that in 1985, he began to receive obscene phone messages on his voice mail at work, and even received such a message one time at home. He reported this to NSC. He claimed the calls further alleged that the calls stopped three days after he threatened to take legal action, although Pocchia has not identified the person(s) against whom he would have taken legal action.

Pocchia described in his complaint that sometime later was notified that he was slated to be placed under the direct supervision of the division from which suspected the obscene calls had been made. He complained about this, and NSC commenced another investigation which was inconclusive, purportedly because Pocchia himself was uncooperative. Pocchia alleged that in May resented with a document which incompletely and inaccurately described his complaint about the phone calls. Pocchia claimed that his refusal to sign this document aroused official company displeasure. After this

meeting, he claimed he received another obscene call. Pocchia then alleged he was summoned to another meeting in White Plains that was held in July 1988 , at which time he was informed that the company was not able to find him a post in another department, apparently because unnamed company employees found Pocchia to be "over-bearing, difficult to work with, [and that he] talks a lot and does no work." Complaint ¶ 13.

In December 1988, Pocchia applied for a six month leave of absence. That request was denied on April 12, 1989. Pocchia also claimed that he received negative evaluations at around this time, supposedly based in part on how he reported and handled the obscene phone calls. Additionally, he was notified that he could expect to be reassigned to White Plains. At this point, Pocchia decided to resign. He signed a broadly worded release in May 1989, and in exchange received payment from NSC $28, 500.[1]

In his complaint, Pocchia claimed in his first cause of action that he was defrauded because when he negotiated his departure from NSC, ha was not informed that NYNEX was considering an early retirement plan. He demanded to be reinstated, or alternatively be awarded the benefits he would have received under the plan. In his second cause of action, Pocchia claimed that he was forced to resign from NSC, and that his "request for a non-disability leave of absence was denied without cause or justification and as part of punitive action taken against the plaintiff for (his) reporting of the obscene and annoyance telephone calls...." Complaint ¶ 36.' In

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1. In this release, Pocchia stated that his resignation was voluntary, and that "[t]he purpose of the agreement is to establish an amicable arrangement for ending my employment relationship with the Company that will allow me to resign from relationship with the Company that will allow me to resign from my job, will release the Company from any claims that I may have against it, and will permit me to receive a fair and reasonable settlement."

his third cause of action, Pocchia claimed, based on equity, that he should either be reinstated, or awarded the plan benefits.[2]

NYNEX removed this case to federal district court in May 1990 because Pocchia's claims with respect to the plan were preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. S1001 *et seq.* It is well settled that ERISA preempts state laws which relate to these plans. 29 U.S.C, S1144(a); *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992); *Lee E.I. DuPont de Nemours and Co.*, 894 F.2d 755 (5th Cir. 1990). Pocchia's request that this case be remanded back to state court accordingly was denied by Judge Edward R. Korman on the record.

In support of the crux of his claim, that the early retirement plan announced in December 1989 had indeed been under review in May 1989 when he resigned, Pocchia submitted an affidavit from John C. Stetson. Mr. Stetson, a lawyer, had been employed in NSC's legal department. He resigned in May 1990, and thus participated in the early retirement plan. Stetson then sued NYNEX and NSC for constructive discharge under the federal age discrimination statute. His case was dismissed on summary judgment. *Stetson v. NYNEX Service Co.*, 995 F.2d 355 (2d Cir. 1993)

Stetson stated in his affidavit that both Saul Fisher and Raymond Burke, Esq., executive vice-president and general counsel of NYNEX. Knew of the early retirement plan by late 1988 or early 1989. Stetson indicated that Fisher conveyed his knowledge at a meeting held on January 24, 1989, and that Burke told him and stated in an affidavit which Burke submitted in Stetson's age discrimination suit, that a management policy

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2. Pocchia moved for summary judgment on his second and third causes of action.

committee "held meetings beginning in 1988, where the need for an early retirement incentive program was discussed and agreement was reached for its implementation." Stetson affidavit ¶ 12. Stetson also claimed that another NSC attorney, Patrick Lee, had stated in an affidavit submitted in Stetson's case that Lee was aware of the program in 1988. Stetson additionally maintained that it was common knowledge among NSC employees that an early retirement plan was being considered in late 1988.

At a subsequent deposition, however, Mr. Stetson recanted many of the claims he had asserted in his affidavit. First, Stetson testified that Fisher never told him of the plan in January 1989:

> Q. So he [Fisher] didn't tell you he had learned of the early retirement program prior to its announcement in December '89?
> A. No.
> Q. Did he tell you after 1990?
> A. No.
> Q. He didn't tell you before 1990?
> A. He didn't tell me, no.

Stetson Deposition Tr. 33.

Stetson similarly testified that Burke never told him when the early retirement plan was first considered, and that Burke in fact had never submitted an affidavit in the *Stetson* case. Tr. 28-29. Stetson claimed that Burke indicated his knowledge of the early retirement plan when Burke was deposed on July 30, 1991 in the *Stetson* case, but Stetson was unable to point to any statements by Burke in the Transcript of that deposition which indicated Burke's knowledge of the plan. Stetson nevertheless contended that the "context" of Burke's deposition testimony showed that management had discussed that management had discussed the early retirement program in 1988 and 1989. Tr. 31-31. Mr. Pocchia, however, has not filed with the court the deposition transcript of Mr. Burke.

Stetson also retracted his claim that Patrick Lee had submitted an affidavit in the *Stetson* case. Tr. 34-35.

Apparently, Lee had been deposed in the *Stetson* case, but Mr. Pocchia also has not filed the transcript of that deposition with the court.

Finally, Stetson testified he could not identify any facts which supported the common knowledge belief of NSC employees that an early retirement plan was being considered in 1988. Tr. 23-24.

The defendants, in support of their motion, submitted the affidavit of Robert F. Leonard, the director of benefits planning for NYNEX. Mr. Leonard stated that

> Consideration of an early retirement incentive (which ultimately resulted in the December 1989 incentive plan) did not commence until the fall of 1989, when I approached Anthony Yezzi of Hewitt Associates of an early retirement incentive plan for discussions with Hewitt Associates concerning the December 1989 retirement incentive. Hewitt proceeded to look into the matter but did not actually come up with a specific proposal until December 1989. The company did not decide to go forward with the retirement incentive and accompanying pension change until shortly before it was announced in December 1989.

Leonard affidavit ¶ 2.

II. *Discussion*

The critical issue is whether NSC breached any fiduciary duties imposed by ERISA which it owed to Pocchia at the time Pocchia resigned. In *Mullins v. Pfizer, Inc.*, 23 F. 3d 663 (2d Cir. 1994), the Second Circuit adopted the views expressed by

the Third and Sixth Circuits, in, respectively, *Fischer v. Philadelphia Elect. Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S.Ct. 622 (1993); and *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), "that '[a] plan administrator may not make affirmative misrepresentations to plan participants about changes to an employee pension benefits plan." *Mullins*, 23 F.3d at 669 (quoting *Fischer*, 994 F.2d at 135).[3]

In *Berlin*, the Sixth Circuit held that the phone company owed a fiduciary duty pursuant to 29 U.S.C. 1104(4) to the plaintiffs from the time that the phone company (through its plan fiduciary and/or plan administrator) began to seriously consider the implementation of the benefits plan at issue there. Once the fiduciary duty arose, because of the company's serious consideration of the plan, the fiduciary then had the obligation"not to make misrepresentations, either negligently or intentionally, to potential plan participants." *Berlin*, 858 F.2d at 1164.

> Like the *Berlin* and *Fischer* courts, we do not require an ERISA fiduciary to be perfectly prescient as to all future changes in employee benefits. 858 F.2d at 1164; 994 F.2d at 135. Nor do we require a fiduciary to " 'to disclose its internal deliberations' " 994 F.2d at 135 (quoting *Drennan v. General Motors Cor.*, 977 F.2d 246, 251 (6th Cir. 1992). We do, however, hold that "when a plan administrator speaks, it must speak truthfully." *Id.*

Mullins, 23 F.3d at 669.

However, Pocchia has not claimed that he even inquired if the defendants were considering any new benefit plans or

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3. The defendants do not challenge Pocchia's standing to assert a breach of fiduciary claim under ERISA.

More significantly, Pocchia has not submitted any evidence that the plan was under serious consideration at the time he resigned in the Spring of 1989. Mr. Stetson's affidavit on this issue was conclusive, and in any event he disavowed at his deposition the claims he had made in his affidavit as to the knowledge Fisher, Burke, and Lee had as to when the plan was first considered.

Moreover, Stetson's reliance on common knowledge does not raise a material issue of fact in this case. "Plaintiff merely asserts that it was a 'generally known truth'..... Without any factual support for this contention, however, plaintiff cannot stave off a motion for summary judgment. A conjecture.' " *Stetson v. NYNEX Service Co.*, No. 90 Civ. 5518, 1992 WL 276574, at 4 (S.D.N.Y. 1992) (quoting *Ritzie v. City University of New York*, 703 F. Supp. 271, 280 (S.D.N.Y. 1989), aff'd, 995 F.2d 355 (2d Cir. 1993). Pocchia also argued that the plan had to have been considered months before the Fall of 1989, because the defendant companies character stoically have been very bureaucratic and sluggish. This argument is likewise speculative and insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

III. *Conclusion*

The plaintiff has not submitted any evidence that the defendants breached a fiduciary duty owed to him when he negotiated his departure from NSC. Accordingly, the court grants defendants' motion for summary judgment, and directs the Clerk of the Court to issue judgment for the defendants.[4]

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4. Pocchia's motion for summary judgment on his second and third causes of action without merit. His second cause of action, that he was forced out of NSC, is precluded by the release he signed, see supra note 1, and his third cause of action, based on equity, fails under the release and also because he has not established that such a cause of action exists under ERISA, or that defendants' conduct was inequitable.

SO ORDERED:

Dated: Brooklyn, New York
May 30, 1995

S/
HONORABLE DAVID G. TRAGER
United States District Judge
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